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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/530,290	06/14/2005	Thomas L. Haschen	4845-0101PUS2	3643
2292 7590 08/13/2009 BIRCH STEWART KOLASCH & BIRCH PO BOX 747 FALLS CHURCH, VA 22040-0747				
EXAMINER BEKKER, KELLY JO				
ART UNIT		PAPER NUMBER		
1794				
NOTIFICATION DATE		DELIVERY MODE		
08/13/2009		ELECTRONIC		

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6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
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10 Ex parte THOMAS L. HASCHEN
11 and ROBERT J. PATTERSON
12

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14 Appeal 2009-002589
15 Application 10/530,290
16 Technology Center 1700
17

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19 Oral Hearing Held: June 25, 2009
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23 Before JEFFREY T. SMITH, MARK NAGUMO, and
24 MICHAEL P. COLAIANNI, Administrative Patent Judges
25

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1 The above-entitled matter came on for hearing on Tuesday,
2 June 25, 2009, commencing at 1:03 p.m., at the U.S. Patent and Trademark
3 Office, 600 Dulany Street, Alexandria, Virginia, before Victoria L. Wilson,
4 Notary Public.

5 THE USHER: Good afternoon. Calendar number 70. Mr. Webster.

6 JUDGE SMITH: Good afternoon, Mr. Webster.

7 MR. WEBSTER: Good morning, sir. How are you?

8 JUDGE SMITH: I'm fine. And you? Could you please introduce
9 your guests.

10 MR. WEBSTER: Yes. This is Mr. Tom Haschen, one of the named
11 inventors, and Mr. Bob Patterson, one of the named inventors.

12 JUDGE SMITH: Welcome. As you know, sir, you have 20 minutes
13 and you can begin when you are ready.

14 MR. WEBSTER: Thank you very much. In this particular
15 application, as you are aware, there are 38 pending claims. Ten of the
16 claims are independent. Claims 83, 103, 105, 109, 112, 114, 115, 119, 120,
17 and 121 are the 10 independent claims. There are 28 dependent claims. All
18 10 independent claims and five of the 28 dependent claims we argue do not
19 stand or fall together.

20 So from our perspective, all of those 15 claims that we just mentioned,
21 the five dependent and the 10 independent, are set forth on pages 6 through
22 20 of the Brief, and the reasons why they don't stand or fall together are set
23 forth on pages 21 and 22 of the Brief.

24 There are a few rejections of record. Some of the rejections are based
25 under 35 USC 112, second paragraph and there is also a rejection under 35
26 USC 103(a). With respect to the first rejection, eight of the dependent

1 claims, claims 87, 89, 90, 96, 106, 110, 116 and 122, are rejected as being
2 incomplete for omitting essential elements.

3 We have traversed this rejection on the record for the reasons in both
4 the Brief and the Reply Brief. I would like to summarize our position.

5 The stated reason for the rejection is it is unclear in what step of the
6 independent claims an increased nutrient value is achieved. We don't think
7 that this statement is true for the reasons we presented in the Brief and Reply
8 Brief but, even if it were true, just for the sake of argument, this particular
9 statement does not identify any elements that are necessary to make the
10 claimed method operative.

11 JUDGE SMITH: Excuse me, counselor. Reading your claim, it
12 appears as though -- and I'm looking back at your independent claim 84 --

13 MR. WEBSTER: Okay.

14 JUDGE SMITH: Reading the preamble, it states that you're
15 enhancing the nutrient value of -- and I'll abbreviate -- the grain byproducts
16 and producing a protein feed presumably therefrom. So --

17 MR. WEBSTER: Yes, that's correct.

18 JUDGE SMITH: The Examiner's question appears to be at which
19 point are you enhancing or "increasing" is the word.

20 MR. WEBSTER: That's -- this is the preamble of the claim.
21 If you get into the body of the claim, we actually create the nutrient source
22 mixture that has the enhanced nutrient value by performing steps A and B.
23 And that's the step -- that's where we actually go ahead and do it and where
24 we recite it in the claims.

25 JUDGE NAGUMO: Does that mean that claim 87, for example, as
26 long as the percentages are met, would be met when the additives are added

1 to the byproduct.

2 MR. WEBSTER: No, it is not when the additives are added,
3 it is what actually happens after the temperature and the moisture content are
4 varied according to that empirical formula.

5 JUDGE NAGUMO: So it is when you cook it?

6 MR. WEBSTER: Yes -- well, it is really not cooking in the
7 sense that they apply heat, and that's one of the things that we sparred back
8 and forth on with the Examiner trying to make our position clear, was the
9 fact that the Inventors apply heat and they really dry it, whereas if you take a
10 look at some of the applied art, they talk about cooking. We really don't
11 have a cooking step. And we are claiming -- I mean there is a comprising
12 language in the claims but what is significant is the fact that they say that
13 they can apply the heat by drying or extruding.

14 So that's one of the things that they do in this invention: They apply
15 heat. And, you know, it is a matter of semantics whether they cook or not,
16 but we don't use the word "cook" in the disclosure itself, whereas the
17 Heitritter reference does talk about cooking.

18 Okay. If those are the questions you have on that, then hopefully I
19 have clarified that.

20 The next rejection under 112 second is that claims 109 through 111
21 and 119 through 121 are rejected as being indefinite in that it is not clear
22 what apparatus is necessary for a system determining means for determining
23 the desirable levels of crude protein in the feed system. Our position in this
24 regard is that if you take a look at the disclosure, the disclosure is pretty
25 thorough talking about how you can determine what you want, and one of
26 the things it says in there, you could just go to nutritionist and nutritionist

1 tells you what nutritional values they want in the feed product.

2 JUDGE NAGUMO: Well, as I understood the Examiner's
3 position, it was really we have all these means plus function terms --

4 MR. WEBSTER: Right.

5 JUDGE NAGUMO: -- and so what is the disclosed means that
6 performed these different functions, and, then, of course, we have got the
7 equivalent.

8 MR. WEBSTER: The one that was raised in the rejection was
9 a system determining means for determining the desirable levels of crude
10 protein in the feed system, and what I am saying is that one of ordinary skill
11 in the art looks to the disclosure and the disclosure mentions a number of
12 means for doing this.

13 They have computer programs for determining nutritional values, they
14 have nutritionists who can perform that, they have guidelines that are out.
15 All these things are discussed in the specification.

16 JUDGE SMITH: Does your specification specifically state
17 that? Do you have a page and line number?

18 MR. WEBSTER: I mean it doesn't -- well --

19 JUDGE NAGUMO: Part of the problem, of course, is that we
20 are constrained by 112, sixth paragraph, so it is not just anything that might
21 possibly perform this function, it is what's actually disclosed.

22 MR. WEBSTER: Right.

23 JUDGE NAGUMO: So that's what we are looking for some
24 assistance here.

25 MR. WEBSTER: Do you gentlemen have any comments on that -- as
26 to the specific means to determine the desirable levels of crude protein in the

1 feed system? I know that there was the specific disclosure in here.

2 MR. PATTERSON: I believe we refer to the NRC dairy
3 recommendations as one source.

4 MR. WEBSTER: I know the NRC is in here. I'm just trying to find
5 the exact citation.

6 MR. WEBSTER: It is probably back up closer towards the beginning.
7 It says in published -- the published application of paragraph 31 the desired
8 nutritional values can be obtained, for example, from published data or, for
9 example, determined on a case-by-case basis based on an analysis of nutrient
10 deficiencies in animals to which the feed and/or the feed and supplement is
11 to be fed or, for example, from product specifications supplied by a
12 customer.

13 In one exemplary embodiment, according to the invention, we only
14 used two of them. And I also know that they do refer in paragraph number
15 33 one may obtain a complete nutrient analysis of ingredients to be used in
16 the formulation and they refer to the National Research Council reference
17 that's right there in that particular paragraph. I don't know if that answers
18 your question but I --

19 JUDGE NAGUMO: Let's proceed. That's a good start.

20 MR. WEBSTER: Okay. The other 112 rejection was claims 116 and
21 122 don't find proper antecedent basis for starting a byproduct solubles
22 source -- nutrient source material and that's -- if you take a look at claim
23 115, for example, that claim 116 depends from, that specific claim starts out
24 at the beginning of the -- I think the second paragraph and it defines -- uses
25 that terminology except it doesn't say "starting," but that is the starting
26 mixture and it leads -- gives the introduction to steps A and steps B that are

1 in that same paragraph.

2 So we believe that one of ordinary skill in the art would be able to
3 figure out that that is the starting nutrient mixture that is being referred to in
4 claims 116 and 122.

5 The last ground of rejection that's of record is the rejection of all of the
6 pending claims as being obvious under 35 USC 103A over the Heitritter
7 reference and the Schingoethe reference.

8 Now, we contend that the invention is not obvious because
9 neither one of Heitritter or Schingoethe discloses a number of positively
10 recited features in the claims and what I would like to do is go through claim
11 84 in this regard because claim 84 actually sets forth a number of these
12 features and we also refer to a number of them in the Reply Brief where we
13 actually set up a specific table.

14 But one of the things that I don't find in either of these
15 applied references, determining desirable levels of crude protein, ruminal
16 undigestible protein, amino acids and post-ruminal digestibility in an end
17 product. We don't find that in either Heitritter -- if Heitritter does it, he only
18 does it at the end of the process. He only sees what he gets.

19 JUDGE NAGUMO: Why isn't that met by some guy saying, "Gee, I
20 want to feed my cows."

21 MR. WEBSTER: Right.

22 JUDGE NAGUMO: You know, "Here's -- send me cow feed," and
23 the manufacturer makes up some cow -- why isn't that -- I mean he knows
24 what to feed cows -- or she does.

25 MR. WEBSTER: Okay.

26 JUDGE NAGUMO: And so that's prepared. So why -- that step

1 seems to be met pretty much by the fact that you are going to
2 make a ruminant feed for some --

3 MR. WEBSTER: As I say, Heitritter doesn't do that until the end
4 when he sees what he has got so I will agree with you on that.

5 JUDGE NAGUMO: So that step seems to be met.

6 MR. WEBSTER: Okay. And then you create a distiller's, brewer's or
7 fermenter's grain byproduct nutrient source mixture having an enhanced
8 nutrient value by adding one or more crude protein or amino acid content
9 sources with -- and he named specifically what they are -- and then adjust
10 the temperature and/or the moisture content of the enhanced nutrient value
11 byproduct nutrient source mixture based on an empirically derived
12 relationship that relates the UIP as a percentage of the crude protein to an
13 end product temperature in a predictable and repeatable manner to produce
14 the end product. That is not in either of the applied references.

15 JUDGE SMITH: Excuse me. Focusing on that, are you saying
16 that the Examiner has not identified creating a distiller's, brewer's or
17 fermenter's grain byproduct nutrient source?

18 MR. WEBSTER: They have created -- they have -- she has
19 shown the source in Schingoethe. It is not in Heitritter. Heitritter does not
20 have that combination -- it just doesn't have those grains. It doesn't have that
21 nutrient source mixture.

22 JUDGE SMITH: Okay. Well, if Schingoethe has the nutrient source
23 and you are trying to make cow feed, for example, wouldn't one have
24 sufficient skill to combine with Heitritter?

25 MR. WEBSTER: Well, there are a number of reasons why we don't
26 think that's possible and why the references actually teach away from each

1 other. Heitritter clearly states in column 3, lines 45 through 48, the process
2 of this invention requires a feed comprising oil seed meal, hulls and water.
3 So the oil seed meal, the hulls and the water are an essential part of
4 Heitritter's invention.

5 When you take a look at Schingoethe, Schingoethe talks about the fact
6 that -- and Schingoethe didn't do any work. Schingoethe is a college
7 professor. Schingoethe states that corn distiller's grains is a good source of
8 ruminally undegradable protein. The only thing they added to that, and he
9 just mixed it in, was nithiamide. That's all they added.

10 When they added that, they got no increase in milk from lactating
11 cows.

12 And on page 3, the second full paragraph, Schingoethe
13 concludes, "The above studies illustrate that corn distillers' grains is a good
14 quality protein source and it cannot be easily improved upon. Corn
15 distillers' grains can easily be used as the only source of supplemental
16 proteins in many dietary situations."

17 So one of ordinary skill in the art taking a look at that would have no
18 incentive to then, oh, hey, this guy Heitritter did something with something
19 entirely different and we are going to go ahead, and even though
20 Schingoethe says don't modify it, just use it the way it is, we are going to go
21 ahead and see if we can modify it based on what Heitritter has.

22 And, of course, the rejection isn't based on Schingoethe in
23 view of Heitritter, it is based on Heitritter in view of Schingoethe saying you
24 can substitute this in here, when Heitritter says you have to have these three
25 requirements for my invention.

26 So, in that sense, we think that they teach away from being combined.

1 But we also think that neither of the references themselves teach the
2 adjusting the temperature of the moisture content of the enhanced nutrient
3 value byproduct source mixture based on an empirically derived relationship
4 that relates the UIP as a percentage of the crude protein to an end product
5 temperature in a predictable and repeatable manner. Neither one
6 of them shows that.

7 Neither one of them shows that the empirically derived
8 relationship is what is in every single claim. That -- so, I mean it is the old
9 story -- remember the song from the Sound of Music, Julie Andrews sang it,
10 "Nothing comes from nothing, nothing ever could." Well, if you have no
11 basis for these limitations in either reference, no matter how they are
12 combined, logically they cannot end up in the combination. They are just
13 not there.

14 And we also think that these claims teach away from being combined
15 with one another.

16 The other -- I mean, I know I'm always told by Board members that
17 you go on the -- the brief and reply brief and we have listed in the Reply
18 Brief a number of arguments as to why these references teach away from
19 each other and shouldn't be combined but even if they -- if one of ordinary
20 skill in the art, for sake of argument, were motivated to combine these, they
21 would not result in the claimed invention because neither of the two
22 references contains those features.

23 JUDGE SMITH: Judge Nagumo, anymore questions?

24 JUDGE NAGUMO: No questions.

25 JUDGE SMITH: Judge Colaianne?

26 JUDGE COLAIANNI: No questions.

1 JUDGE SMITH: Okay.

2 MR. WEBSTER: The only other thing I would like to say is we do
3 show some comments in there that some of the remarks that were made by
4 the Examiner, for example, sort of relating corn, meal and corn gluten meal,
5 one of ordinary skill in the art would not really agree with the context in
6 which the Examiner presents them because corner gluten meal has a protein
7 level of 60 percent, whereas corn meal has a protein level of 8 percent.

8 These are things that were brought out in there but I just wanted to
9 mention to you the fact that when you are reviewing this, try to place
10 yourself in the mind of one of ordinary skill in the art which, you know, is
11 something that's always difficult to do because either -- most people are
12 either higher or lower but it is always a difficult thing to do.

13 Are there any other questions?

14 JUDGE SMITH: No. No further questions.

15 MR. WEBSTER: Thank you very much.

16 JUDGE SMITH: Thank you for coming in today. The case is
17 submitted. If you could, please provide a business card for you and your
18 associates to the transcriber or just make sure she has your spelling for the
19 record.

20 Whereupon, the proceedings at 1:25 p.m. were concluded.